

MEMORANDUM OF LAW

DATE: January 13, 1987

TO: Gary Stephany, Chief, Division of
Environmental Health Protection
FROM: City Attorney
SUBJECT: Retroactivity of State Swimming Pool Fencing
Law

By memorandum dated November 4, 1986, you requested this office's advice concerning a proposed retrospective application of the requirements for fencing around public swimming pools. You made specific reference to an objection presented by counsel for the Trusthouse Forte Hotel chain alleging that state requirements pertaining to fencing could not be retroactively applied to swimming pools constructed at a time when fencing requirements were not applicable. The specific issue concerns the width of fence openings rather than whether a fence must be installed, however.

For the reasons outlined below, we are of the opinion that requirements affecting life safety may be retrospectively applied. Whether that will apply to the specific width of fence openings will depend upon the factual justification in support of four-inch width openings versus some other width as a public safety issue. It would seem logical that the smaller the opening, the less the opportunity for a small child to squeeze through the fence into the pool area. However, the empirical basis for concluding that a seven inch width, as contested by Trusthouse Forte, is not sufficient needs to be examined.

Attached is a memorandum on the retrospective application of laws affecting public safety. The principles there are applicable to the issue you present, in so far as the existing provisions of Health and Safety Code section 24102 allow retrospective application to swimming pools that are not "reasonably safe."

Health and Safety Code section 24102 reads as follows:

The state department shall make and enforce such rules and regulations pertaining to public swimming pools as it deems proper; provided, that no rule or regulation as to design or construction of pools shall apply to any pool which has been constructed before the adoption of such rule or regulation, if such

pool as constructed is reasonably safe and the manner of such construction does not preclude compliance with the requirements of such rules and regulations as to bacteriological and chemical quality and clarity of the water in such pool.

Counsel for Trusthouse Forte argues that the non-retroactivity of section 24102 applies to both the pool and its appurtenances, which he states includes the fencing; he argues by implication that no change in fencing rules would be permissible to the extent that the "fence" is reasonably safe.

The definition of "pool" or "swimming pool" includes the appurtenances. See Health and Safety Code section 24100. Title 22, California Administrative Code section 65503(c) makes the Chapter applicable to "all auxiliary structures and equipment provided and maintained in connection with pools, including but not limited to ... (9) safety equipment." Title 22, California Administrative Code section 65509 then provides that "swimming pools shall conform to the provision of Chapter 2-90, Title 24, Building Standards, California Administrative Code." In Title 24, California Administrative Code section 2-9024, the building standards require enclosure of a pool by a fence, a portion of a building wall or other durable enclosure, and openings that do not exceed 4 inches in any dimension.

As the attached memorandum points out, the exercise of the police power relating to public safety is legally permissible, absent preemption. It is also clear that the legislature intended that new rules relating to swimming pools should not be applied retrospectively unless the pool is not reasonably safe. Fencing certainly relates to safety as does the width of the apertures. The difficulty with the position taken by Counsel for Trusthouse Forte is that it ignores the retrospective application of public safety rules to pools that are not "reasonably safe." Thus, if you can demonstrate that apertures greater than 4 inches render the pool unsafe, you may require modification. Of necessity, this may involve a case-by-case determination regarding the width of the apertures at various pools.

As far as the requirements for pool enclosure, however, we perceive no valid reason for not requiring all pools to be safely enclosed; we would merely observe, however, that the codes do not establish any distance requirements from the pool edge to the enclosure structure or fence. Thus, the safety of the enclosure is also subject to case-by-case determination.

JOHN W. WITT, City Attorney

By
Rudolf Hradecky
Deputy City Attorney

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Attachment

ML-87-4